



Proposed Regulation Agency Background Document

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| Agency name | State Mental Health, Mental Retardation, Substance Abuse Services Board |
| Virginia Administrative Code (VAC) citation | 12 VAC 35 –45 et seq. |
| Regulation title | Regulations for Providers of Mental Health, Mental Retardation, Substance Abuse, <u>and Brain Injury</u> Residential Services for Children |
| Action title | Addition of provisions for licensing providers of brain injury services |
| Date this document prepared | April 18, 2006 |

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

In a short paragraph, please summarize all substantive changes that are being proposed in this regulatory action.

This action will amend the existing Regulations for Providers of Mental Health, Mental Retardation, and Substance Abuse Residential Services for Children to include provisions for licensing providers of brain injury services. The existing regulations provide standards for licensing providers of residential treatment services for children with mental illness, mental retardation or substance use disorders and are an addendum to 22VAC42-10-10 et seq., which are generic (core) standards governing a wide variety of residential facilities licensed by the Departments of Mental Health, Mental Retardation and Substance Abuse Services (Department), Social Services, Education, and Juvenile Justice. The standards in this addendum or “Mental Health Module” as it is operationally called, cover a wide range of residential services from small group homes to large residential treatment facilities. The proposed regulatory action adds a definition of “brain injury” and incorporates brain injury service into the definition “services” that are governed by these regulations. Several other definitions have been added or revised to encompass brain injury services. The regulations have been revised to require providers of brain injury services to maintain policies and structured programs to reduce or ameliorate the effects of brain injury. They add “neurobehavioral service” to the scope of services that may be part of a structured program. The amended regulations also include requirements for the staff and supervision of residential facilities for children with brain injury.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

The State Mental Health, Mental Retardation and Substance Abuse Services Board (Board) has the statutory authority to adopt the proposed regulations under Va. Code § 37.2-203 and Chapter 725 of the 2005 Virginia Acts of Assembly. The authority is mandatory.

Purpose

Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve.

This regulatory action will add provisions to the existing Mental Health Module to enable the Department to license providers of residential services for individuals with brain injuries. Virginia does not currently have a Brain Injury Waiver.

In December 2005, the Board adopted emergency regulations to implement the provisions of the new legislation. Prior to that, there was no designated licensing authority for residential services serving individuals with brain injuries and some applicants had been denied licensing as a result. This action will allow these services to continue to operate in Virginia. Before this specific licensing authority was implemented, some residential brain injury services were licensed as assisted living facilities by the Department of Social Services. This licensing authority has been or will be transferred to the Department.

The agency has developed the regulations in collaboration with the Department of Rehabilitative Services and representatives of various stakeholder groups. The regulation is intended to establish a framework for licensing providers of brain injury services to ensure there is appropriate and consistent oversight, support, and resources to provide an acceptable standard of care for persons who receive services. Prior to this, there has been no single authority responsible for oversight of this residential service. Therefore, this regulatory action is essential to protect the welfare of residents of Virginia with brain injuries and to ensure fair and consistent monitoring of providers of this service.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (More detail about these changes is requested in the "Detail of changes" section.)

Existing definitions have been modified and new definitions have been added to identify providers of brain injury services to be subject to licensing requirements. New definitions include "brain injury" and "neurobehavioral services" to clarify and facilitate the implementation of the new licensing provisions. Provisions have been added to require providers to have policies for children with a diagnosis of brain

injury in a residential service. Neurobehavioral services are added to list of services that are provided in a residential setting and providers are required to assess the needs of residents with brain injury. The provider staffing requirements are changed to require brain injury service providers to employ or contract with staff with the appropriate credentials to provide brain injury services.

Issues

Please identify the issues associated with the proposed regulatory action, including:

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

If the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.

These regulatory provisions help to ensure that providers of services to children with brain injury maintain an acceptable standard of care by requiring them to comply with specific licensing requirements. The Department will monitor such providers to ensure that they are accountable and will be available to provide technical assistance to resolve any deficiencies. This should be advantageous to children with a diagnosis of brain injury and their families and ensure fair and consistent monitoring of services for providers.

The Department's existing Office of Licensing will be responsible for licensing children's residential treatment providers of brain injury services in accordance with the new regulations. This is a cost-efficient and effective means to implement the new licensing requirements because this Office has the administrative support and experience to perform the required functions. Therefore, these regulations should be advantageous to the Department, providers of brain injury services, and the public.

There are no known disadvantages to consumers, providers of services or the public.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which are more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

There are no applicable federal requirements. If a brain injury waiver is funded, there will be federal Medicaid regulations that cover standards for payment, although they would not cover the health and safety of the services. In that respect, these regulations would exceed the federal requirements.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

There is no locality that is particularly affected by these regulations that will bear a disproportionate material impact, which would not be experienced by other localities.

Public participation

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.

In addition to any other comments, the board/agency is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the agency/board is seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so by mail, email or fax to Leslie Anderson, Virginia Department of Mental Health, Mental Retardation, and Substance Abuse Services, P.O. Box 1797, (804) 371-6885, (804) 692-0066, leslie.anderson@co.dmhmrsas.virginia.gov. Written comments must include the name and address of the commenter. In order to be considered comments must be received by the last date of the public comment period.

Economic impact

Please identify the anticipated economic impact of the proposed regulation.

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| Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures | None |
| Projected cost of the regulation on localities | None |
| Description of the individuals, businesses or other entities likely to be affected by the regulation | The regulations apply to residential facilities for children that provide services to children with brain injuries. |
| Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million. | It is estimated that there will be fewer than five facilities affected by these regulations. All would likely be small businesses. |
| All projected costs of the regulation for affected individuals, businesses, or other entities. Please be specific. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses. | These are new regulations. There are no existing regulations specifically for brain injury services for children. If these service providers were licensed, they would have been licensed by the Virginia Department of Social Services under the same “core” regulations. The new regulatory standards are proposed to become part of the “module” and pertain to human rights protections and reporting |

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| | requirements, and staff qualifications. Any additional administrative expense to providers to implement these regulations should be minimal. |
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Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in §2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.

There are no appropriate alternatives to this regulatory action. The agency is required to adopt regulations to implement the provisions of the Chapter 725 of the Virginia 2005 Acts of Assembly. The agency has developed the regulations in collaboration with a stakeholder group, which included representatives of the Virginia Department of Rehabilitative Services, providers, and community organizations with an interest in brain injury services. Some of these stakeholders represented small businesses that provide residential services to persons with brain injury. This group considered various alternatives for meeting the requirements of the legislation. The agency and stakeholders determined that the provisions of this regulation provide the least intrusive and most economical means to license providers of brain injury services and ensure the welfare of persons who are receiving services from licensed providers.

Regulatory flexibility analysis

Please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

The existing “module” regulations apply largely to small residential businesses licensed by the Department that provide mental health, mental retardation, and substance abuse services. The intent of this regulatory action is to add provisions to the existing regulation to enable the Department to license certain residential providers of services to children with brain injury. The regulations are generally designed to accomplish the regulatory objectives taking into consideration the conditions of these small business providers.

Public comment

Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.

There were no comments received following the publication of the NOIRA.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one’s spouse, and one’s children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

This regulatory action will implement requirements for licensing providers of services for persons with brain injury. The licensing standards will provide a means regulatory oversight and accountability of service providers. This should have a positive impact on the stability the families of persons with brain injury by promoting the quality of service and an acceptable standard of care. The regulations should not have any significant impact on the authority or rights of parents, self-sufficiency or individual responsibility, marital commitment, or family income.

Detail of changes

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail all new provisions and/or all changes to existing sections.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all changes between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.

For changes to existing regulations, use this chart:

| Current section number | Proposed new section number, if applicable | Current requirement | Proposed change and rationale |
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| 10 | | This section provides definitions of terms that are relevant to the current regulations. Terms that are specifically applicable to brain injury services and providers are not used in the current regulations and not defined in this section. | Changes have been made to the definitions of “care;” “residential treatment program;” and “service.” Each definition has been expanded to encompass brain injury services or facilities, as appropriate. The definition of “service” is expanded to include “planned individualized interventions intended to reduce or ameliorate the effects of brain injury. This will allow the Department to license residential programs that provide brain injury services under these regulations. Definitions are added for “brain injury;” and “neurobehavioral service.” These terms are used in new provisions for brain injury services. The definitions are intended to clarify and facilitate the implementation of the |

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| | | | new regulatory requirements. |
| 80C | | The current provision requires service providers to have and implement written policies for structured programs for the care and treatment of facility residents with mental illness, mental retardation, and substance abuse. This section also lists the types of services or interventions that may be provided to residents of facilities. | The requirement has been expanded to require policies for persons with brain injury in a residential service. "Neurobehavioral services" is added to the list of services that are provided to the residents of facilities. |
| 80D | | The current section requires providers to have formal arrangements for evaluation, assessment, and treatment of the mental health needs of residents. | This provision has been expanded to require providers to assess the brain injury needs of residents. |
| 210 | | | This new section has been added to the regulations requiring that providers of services to persons with brain injury employ or contract with staff with the credentials that are considered appropriate for the type of services provided. |

No proposed changes have been made since the publication of the emergency regulation.